79529-1



NO. 56873-6-I

**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

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JACK OLTMAN, BERNICE OLTMAN and SUSAN OLTMAN
Appellants/Petitioners,

v.

HOLLAND AMERICA CRUISE LINE USA, INC. and
HOLLAND AMERICA LINE, INC.

Respondents.

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# PETITION FOR REVIEW

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## 1. Identity of Petitioner

Appellants, Jack Oltman, Bernice Oltman[1] and Susan Oltman

## 2. Citation to Court of Appeals Decision

Petitioners respectfully requests that the Washington Supreme Court review:

a) the decision of the Court of Appeals, filed September 11, 2006 – affirming the decision and judgment of the King County Superior Court – (attached hereto as Appendix A); and

b) the Court of Appeals Order Denying Plaintiff/ Appellants' Motion for Reconsideration, filed October 24, 2006 (attached hereto as Appendix).

## 3. Issues Presented for Review

Issue 1: Whether it is proper for a Defendant to assert an affirmative defense of improper venue (to enforce a forum selection clause) when that Defendant failed to file a timely Answer **and** where the failure to timely answer caused actual prejudice to Plaintiff.

This issue affects all lawsuits filed in Washington State court, and therefore satisfies RAP 13.4(b)(4) affecting a substantial public interest.

Issue 2: Whether it is proper for a Party to cite (and physically provide) unpublished, state court cases to the trial court (cases in which the Defendants' counsel had acted as counsel) where, it is argued, the cases presented are irrelevant and serve no other benefit but to unfairly prejudice the proceeding;
This issue affects all lawsuits filed in Washington State court and therefore satisfies RAP 13.4(b)(4), affecting a substantial public

[1] Bernice Oltman passed away while the case was pending in the Court of Appeals.



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This issue affects all lawsuits filed in Washington State court and therefore satisfies RAP 13.4(b)(4), affecting a substantial public interest. And, we believe, this decision is at odds with Division II's dicta in *St. John Medical Center v. State of Washington*, 110 Wash.App. 51, 38 P.3d 383, FN5 (Wash.App. Div 2 2002).

Issue 3: Whether a non-traveling Spouse can be held to a passenger cruise contract that she did not enter, sign or agree to, and where no argument was advanced by the moving party below.

We believe that the decision of Division 1 is squarely at odds with Washington law on contracts, including, at least the following cases: *State ex rel. Elec. Prods. Consol. v. Superior Court*, 11 Wn.2d 678, 679, 120 P.2d 484, 484-485 (1941); *State ex rel. Lund v. Superior Court*, 173 Wn. 556, 558, 24 P.2d 79 (1933) RAP (b)(4)(2)

Issue 4: Whether under the specific facts of this case, a cruise ship passenger ticket contract of adhesion, its forum selection clause and one year statute of limitation (reducing the state and federal three year limitations) is valid and enforceable under prevailing Washington State and United States Federal Law, when the passenger only receives the ticket at the time that he/she boards the cruise ship.

This issue effects a significant public interest under RAP 13.4(b)(4), as Washington state is a staging ground for cruise ship passengers, and also, because Holland America, and perhaps other cruise lines are designating Washington courts as the fora for dispute resolution.

Issue 5: Whether Plaintiffs claims set forth a basis for federal admiralty jurisdiction in the first place, and whether it was error for the trial court to refuse to make findings on this issue.

Division 1 did not appear to address this issue.

Issue 6: Whether a Plaintiff's filing in State court under the Savings to Suitors clause serves to deprive the federal court of subject matter jurisdiction; and thereby complies with the Defendant's forum selection clause.



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This is an issue of first impression for Washington courts. RAP 13.4(b)(4).

### 4. Statement of the Case

Although the underlying theories of the case involve personal injury on a cruise ship, the issues involved in the present appeal relate to a forum selection clause and the Plaintiffs' right to file their action in State Court (over Federal Court, if at all). The Plaintiffs/Appellants Jack and Susan are husband and wife while Bernice Oltman is Jack's elderly mother. The Defendants are Holland America Line – USA Inc, and Holland America Line Inc. (Collectively referred to as Defendants or "Holland America").

Having viewed the Defendants' (Holland America) advertising, on March 18, 2004, Jack and Bernice Oltman decided to purchase a ticket aboard the Defendants' luxury cruise ship, the ms Amsterdam (CP 232) through Vacations To Go travel agency. (CP 253). The Defendants advertised safe, exciting and luxurious cruises to the American public (CP 275). Unaware of the history of the Defendants' operation of its cruise lines (and specifically, the ms Amsterdam), Jack and Bernice boarded the ms Amsterdam on March 31, 2004. (CP 275)[2] Not long into the cruise, a

[2] However, the Defendants' vessels have had at least 15 major outbreaks of gastrointestinal illness in the last 3 years – outbreaks which have sickened hundreds of



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severe gastrointestinal disease broke out and infected many passengers. (CP 233), prompting the vessel's captain to make an announcement (CP 292, pp 291-292) and issue a health notice (CP 293-294). Since the crew did not quarantine any of the infected passengers, who continued to commingle with the rest of the passengers (CP 264, 240-269), the virus continued to be transmitted from passenger to passenger (CP 266). Toward the end of the cruise, both Jack and Bernice were infected with the virus and began to experience severe symptoms. (CP 233).

Due to the length and severity of their illnesses, on March 30, 2005, Jack and Bernice filed a Complaint in the Superior Court of King County against the Defendants for inter alia, Negligence, Breach of Contract and Fraud (CP 3-12) – i.e. all state court causes of action. Susan Oltman, Jack's wife, joined in the Complaint with her separate claim for the loss of consortium. (CP 239). Holland America then moved to dismiss the Plaintiffs' Complaint for improper venue, arguing that the Plaintiffs were required to file in Federal Court over State Court due to a forum selection clause contained in the passenger cruise ticket. (CP 195-204)

The summary judgment hearing was set for August 12, 2005. (CP 152-153) At the hearing, it was undisputed that Jack Oltman and his

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passengers. (CP 281-285) The ms Amsterdam alone had as many as 863 reported cases of passengers sick from such illnesses (CP257).



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mother, Bernice, received their travel documents either approximately six days prior to boarding, or else, on the very day they boarded the Defendants' vessel in Chile. (CP 232). In neither case did they have any opportunity to review the fine print in the travel documents. (CP 232; CP 236) Immediately following the hearing, the Court entered Summary Judgment in favor of the Defendants. (CP 495-497). Plaintiffs then moved for Reconsideration (CP 500-504), which was denied (CP 509). The Oltmans then appealed to Division I which heard oral argument on July 26, 2006 and issued an opinion on September 11, 2006. The Oltmans moved for Reconsideration on October 2 which, by majority decision, was denied on October 24, 2006. This Petition now follows.

## 5. ARGUMENT

**Issue 1: Whether it is proper for a Defendant to assert an affirmative defense of improper venue (to enforce a forum selection clause) when that Defendant failed to file a timely Answer and where the failure to timely answer caused actual prejudice to Plaintiff.**

The Plaintiffs filed their complaint on March 30 and served the Defendants on April 1. (CP 24) The Defendants did not serve their Answer until May 2, i.e., 31 days after the date of service, even though CR 12(a)(1) clearly requires the Defendant to serve an Answer within 20 days of service. (CP 274) Notwithstanding the mandatory language of Rule 12(a), through its employ of the word "shall", Washington courts appear



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to have acquiesced in permitting defendants to file answers well beyond the 20 day requirement set forth in the rule – and all without penalty to the defendant. Thus, defendants have long taken advantage of this absence of enforcement of the 20 day mandatory nature of Rule 12(a), causing the extra and needless effort by the Plaintiffs on the motion for default and waiting until the last moment to file their Answer, and perhaps even longer to assert their affirmative defenses.[3]

Washington courts, however, appear to have not yet directly ruled on the issue of a Rule 12(h)(1) waiver (Waiver or Preservation of Certain Defenses). That is, whether the failure to assert an affirmative defense of improper venue with the Answer, within the 20 day period for filing Answers, may result in a waiver of that affirmative defense. With no Washington law on point, we turned to federal courts opinions for guidance and found that several courts have imposed penalties upon a Defendant for his/her late Answer. For example, in *Bavouset v. Shaw's of San Francisco*, 43 F.R.D. 296 (S.D. Tex. 1967), a defendant who failed to answer a complaint within the prescribed time was found to have waived its right to assert a Rule 12(b) defense by motion under Rule 12(h).

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[3] But see *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068, 1071 (1975) (Certain defenses are to be pleaded affirmatively to avoid surprise); and *Davidson v. Hensen*, 135 Wn.2d 112, 123, 954 P2d 1327 (1998) (defenses are waived if not raised)



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Another court reaching this conclusion was *Zwerling v. New York & Cuba Mail S. S. Co.*, 33 F.Supp.721 (E.D.N.Y. 1940).

While Plaintiffs would concede that the actual number of days that the Answer was late in this case is not facially outrageous compared to answers filed in some cases; the real key is not that the Answer was filed 1 day, 11 days or 1100 days late, rather, in this case and on these facts, that the Defendants' failure to file within the required 20 days caused actual and true prejudice to the Plaintiffs. The reason for this is had the Defendants filed their Answer (with their affirmative defenses) on or before the 20th day after they were served with the Summons and Complaint, the Plaintiffs would have been aware of the Defendants' antithetical and broader interpretation of the forum selection clause, and the Plaintiffs would have had time to consider re-filing their claim in the Federal District Court before the expiration of the one year statute of limitations. (CP205-307) Thus, in this Petition for review, Plaintiffs request that the Court extend the rule that affirmative defenses are (or may be) waived (and stricken) if not raised within the 20 day period for filing – particularly where the Plaintiff has suffered prejudice due to the late filing of the Answer/Affirmative Defense.

**Issue 2: Whether it is proper for a Party to cite (and physically provide) unpublished, state court cases to the trial court (cases in which the Defendants' counsel had acted as counsel)**



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**where the cases cited are irrelevant and serve no other benefit but to unfairly prejudice the proceeding;**

In support of their Motion for Summary Judgment, the Defendants submitted a declaration of one of their attorneys, which included citation to a number of unpublished cases from the trial court. (CP 154-194) The Defendants also provided copies of these unpublished trial court orders which had the effect of dismissing other plaintiffs' claims against Holland America (under, it was alleged, similar forum selection clauses). Because the great majority of the cases were not published[4] and none were related to the present case in any way, except by sharing the same Defendants (and the same or similar forum selection clause), Plaintiffs moved to strike the offending documents. (CP 310-314) The court denied Plaintiffs' Motion to Strike at the beginning of the Summary Judgment hearing, stating that the trial court would not strike an attorney's declaration (VR 4, lines 23-24; CP 505-507).

These cases were extremely prejudicial to the Plaintiffs' case because they purport to include identical facts and issues as were present in the current case, and meant to influence the trial court judge to take the same position as her colleagues on the King County Superior Court

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[4] In their opposition brief, Defendants respond by stating that there were two published cases of the nine. (CP71-78, Defendants' Opposition to Motion to Strike, pages 1-2).



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(colleagues that Judge Spector may see and interact with on a daily basis). But these cases were not the same, did not have the same facts and did not have the same legal arguments advanced; and therefore served no evidentiary or authority type purpose to assist the trier of fact in assisting it in making its decision. The only purpose served was to sway the trial court to adopt an opinion which, the Defendants were asserting, was similar and consistent with that of her colleagues.

It is of course well established that a party may not cite unpublished court of appeals cases to the court of appeals. RAP 10.4(h) This is also true of citing unpublished court of appeal cases to the trial court. See for example, *Johnson v. Allstate Insurance Company*, 108 P.3d 1273, 126 Wash. App. 510 (Wash.App.Div.2 2005)[5] And, just as unpublished court of appeals decisions are prohibited from citation to the Court of Appeals (and trial court), and unpublished trial court cases are not to be cited to the appellate court, unpublished trial court opinions should likewise be prohibited from being cited to the trial court. The fact that the cases submitted by the Defendant were not court of appeals cases should not lessen the egregious nature of their inclusion, nor result in a

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[5] In footnote five to its opinion in *St. John Medical Center v. State of Washington*, 110 Wash.App. 51, 38 P.3d 383, FN5 (Wash.App. Div 2 2002), Division Two of the Court of Appeals recognized that **trial court** decisions that are not published are also prohibited from citation as authority (in the appellate court).



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remedy other than reversal, as unpublished trial court cases have even far less precedential value (weight and certainty) than an unpublished appellate court case – and are meant for only the parties before the court in that case.[6]

**Issue 3: Whether a non-traveling Spouse can be held to a passenger cruise contract that she did not enter, sign or agree to, and where no argument was advanced by the moving party below.**

Generally, to be bound by a contract in Washington, a person must assent to the agreement. *See e.g. Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 389, 858 P.2d 245, 255 (1993) ("Mutual assent is required for the formation of a valid contract."). A contractual provision is not normally enforceable against a party to an action not a party to that contract. *See e.g. Shower v. Fischer*, 47 Wn.App. 720, 728-729, 737 P.2d 291, 295 (1987).

As with other sorts of contractual provisions, forum selection clauses are not effective against third parties who did not agree to the contract containing the clause and are not parties to that agreement. *American Mobile Homes v. Seattle-First National Bank*, 115 Wn.2d 307, 321-322, 796 P.2d 1276, 1283-1284 (1990). When not all the parties to an

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[6] In addition, in the trial court cases, the orders presented are usually the orders prepared by the successful attorney and do not include the necessary facts/reasoning.



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action are parties to an agreement containing a forum selection clause, the agreement will not be subject to mandatory application. *Id.*; *see also State ex rel. Elec. Prods. Consol. v. Superior Court*, 11 Wn.2d 678, 679, 120 P.2d 484, 484-485 (1941); *State ex rel. Lund v. Superior Court*, 173 Wn. 556, 558, 24 P.2d 79 (1933) (both holding that a wife is not bound by a forum selection agreement signed only by her husband).

In this case, there existed no evidence, not a single shred – no testimony, no documents, no signature, no inference of assent, and not even a single legal theory (advanced by the Defendants) – which could have supported the trial court's holding that the forum selection clause in the Defendants' Cruisetour Contract was enforceable against Susan Oltman – the wife of a passenger who did not herself travel on the cruise. [7] The fact is that Susan did not enter any contract, agree to one, or even have seen one. (CP 238-239) In fact, with the exception of passing reference in a footnote in the Defendants' reply brief, Plaintiffs cannot cite to anywhere in the record where the Defendants made any argument with respect to how Susan Oltman could be held to this contract.

Thus, the decision of the trial court was not only surprising but was, we believe, clearly an error of law. With one fell swoop, Division I

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[7] Even the passenger contract limits itself to persons traveling under it. (CP 109).



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has done away with the notion of privity of contract as well as years of Washington contract law, including appearing to overturn Washington Supreme Court authority on holding spouses to forum selection clauses they did not sign. Plaintiffs therefore respectfully request the Supreme Court to reverse the trial court (and Court of Appeals) and remand Susan Oltman's claims for further proceedings in the trial court.

**Issue 4: Whether a cruise ship passenger ticket contract of adhesion, its forum selection clause and one year statute of limitation (reducing the state and federal three year limitations) is valid and enforceable under prevailing Washington State and United States Federal Law, when the passenger only receives the ticket at the time that he/she boards the cruise ship.**

**Validity and Enforceability of Contracts of Adhesion and Forum Selection Clauses**

Before considering whether to transfer venue (or dismiss the state court action favor of a federal venue), the trial court must first determine the validity/enforceability of the cruise ship contract (and its forum selection clause), *Boutte v. Cenac Towing, Inc.*, 346 F.Supp.2d 922 (S.D. Texas 2004). In such an analysis, we believe that the first determination for the Court is whether to apply state law or federal law to the issue of contract formation (and validity).

While Plaintiffs acknowledge that disputes concerning cruise ships contracts may fall within the realm of maritime law, such a rule for all



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types of dispute does not appear to be mandatory,[8] and, in fact, it is not so clear that issues concerning the formation of these contracts fall within the purview of federal maritime law at all – especially where the alleged formation (and fraud/misrepresentation thereof) of the contract takes place on dry land, before the ships sets sail.[9] Also, there is the possibility that the purchaser of the cruise will not join the voyage, thereby further giving credence to state law only claims, such as misrepresentation and fraud (in advertising). As decisions post *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) have impliedly held, there is no preclusion against state law contract principles being applied to the contract formation portion of the cruise tour contract. The Massachusetts Court of Appeals, in a case just over one year old (June 30, 2005), *Casavant & Another v. Norwegian Cruise Line, LTD.*, 63 Mass.App.Ct. 785, 787-789 (2005) demonstrates a perfect example of this interplay, where the court applied both federal and state (MA) law to hold that the forum selection clause was invalid.

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[8] *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268, 93 S.Ct. 493, 504, 34 L.Ed. 2d 454 (1972) (The test for admiralty jurisdiction requires both that the injury occur on navigable waters and that the activity have some connection to maritime commerce).

[9] *Cf. Guidry v. Durkin*, 834 F.2d 1465 , 1469 (9th Cir. 1987).(Admiralty jurisdiction is lacking where the tort occurs, or the negligence took effect, solely on dry land.); and *Doonan v. Carnival Corporation*, 404 F.Supp.2d 1367, 1370 (S.D. Florida 2005) (Even in cruise ship injury cases, the court must determine whether there is admiralty jurisdiction over tort claims – looking to the tests of locality and maritime relationship).



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> [A]nd because, in the limited time frame allotted, the Casavants did not accept the ticket as a binding contact, **under controlling Federal maritime law and Massachusetts contractual law,** the Florida-dictated forum selection clause is not enforceable.

*Washington State Law Analysis*

Under Washington law, then, the contract at issue is clearly one of adhesion. *Adler v. Fred Lind Manor*, 103 P.3d 773, 153 Wash.2d 331 (2004). We believe that this contract is also substantively unconscionable as applied in this case. Cf *Zuver v. Airtouch Communications, Inc.*, 103 P.3d 753, 153 Wash.2d 293 (2004).[10] The forum selection clause and the one-year limitation provision are both unconscionable, and against public policy, in that these terms can be used together to deny the Plaintiffs their right to a trial by jury under the Washington state constitution[11] and, in this case, to actually having their day in court at all – as once dismissed from state court, the Defendants would (and in fact did) turn around and move to dismiss the case from federal court based upon the one year

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[10] The first unconscionable term in this adhesion contract is the one-year shortened statute of limitation provision for bringing claims against the Defendants. – The Supreme Court of Washington in *Adler*, 153 Wash.2d 331, criticized time limitations in adhesion contracts noting that 1-year limitations have been rendered invalid by other courts as against public policy. A second unconscionable term in the contract is the forum selection clause, which apparently makes it necessary for a plaintiff to file in state court under the savings to suitors clause or having gone beyond the one year shortened statute of limitations.

[11] Article I, Section 21. Generally, there is no common law trial by jury in admiralty. *Craig v. Atlantic Richfield, Co.*, 19 F.3d 472 (9th Cir., 1994).



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shortened statute of limitation (which has now passed). As a result, Plaintiffs will be forever barred from litigating at all!

Moreover, under Washington law, enforcement of a forum selection clause may be denied where is proven to be unreasonable and unjust. *Kysar v. Lambert*, 76 Wash.App. 470, 484, 887 P.2d 431, 440 (1995), review denied, 126 Wash. 2d 1019, 894 P.2d 564 (1995). There is hardly a better example of unreasonable and unjust then being permanently barred from maintaining suit, especially where the Defendants filed an untimely affirmative defense and where there forum selection clause is anything but clear.

*Federal Law Analysis*

Not only does this contract of adhesion fail under state law, but under federal maritime law as well.[12] Under federal law, for a cruise line passenger ticket's terms and conditions to be enforceable against a traveler, the ticket must **reasonably communicate** the limiting terms to the passenger so that the passenger can become meaningfully informed of its terms.[13] Plaintiffs assert that the cruise ship contract in the present case

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[12] It should be noted here that Plaintiffs are not charging that cruise ship forum selection clauses are generally invalid, but in this case, under these facts, this one is.

[13] [The Ninth Circuit] employ[s] a two-pronged 'reasonable communicativeness' test . . . to determine under federal common law and maritime law when the passenger of a common carrier is contractually bound by the fine print of a passenger ticket. . . . The first prong of the reasonable communicativeness test focuses on the physical characteristics of the ticket. * * *The second prong of the reasonable



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fails both prongs of the **reasonable communicative** test as the warnings were not conspicuous, and instead submerged among 30 pages of a pre-printed form contact; and as the Plaintiffs did not receive the terms and conditions until they boarded the cruise ship for departure.[14] (CP 232) The failure to reasonably communicate the terms of the contract of adhesion (through advance mailing or through an agent) deprived Plaintiffs of any meaningfully opportunity to review the 30 pages of fine print terms and conditions which accompanies the itinerary and ticket.

In *Casavant,* 63 Mass.App.Ct. 785, 787-89 the Massachusetts Court of Appeals was asked to decide an issue very similar to the present one, and in that case, the court held the forum selection clause to be invalid.

> The record reflects that Norwegian had not provided information concerning the forum selection clause ... – until ...approximately thirteen days before the sail date....
>
> Because the manner and means of the delivery of the terms of the contract for passage did not fairly allow the Casavants 'the option of rejecting the contract with impunity', and because, in the limited time frame allotted, the Casavants did not accept the ticket as a binding contract...the Florida-dictated forum selection clause is not enforceable. Suit may therefore proceed in the Massachusetts courts.

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communicativeness test requires us to evaluate "the circumstances surrounding the passenger's purchase and subsequent retention of the ticket/contract.'. *Bobbie Jo Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 835-836 (9th Cir. 2002) (internal citations omitted).

[14] Taking the evidence in the light most favorable to the non-moving party.



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In addition, assuming arguendo that the terms were reasonably communicated to the Plaintiffs (which they were not) even the analysis offered by the Supreme Court in *Carnival Cruise* favors the Plaintiffs. In *Carnival Cruise*, the Supreme Court recognized that forum selection clauses must be reviewed under a standard of reasonableness and fairness,[15] *Carnival Cruise*, 499 U.S. at 595.[16] Therefore, we respectfully urge that the Court strike the forum selection clause as applied to the facts of this particular case.

**Issue 5: Whether Plaintiffs claims set forth a basis for federal admiralty jurisdiction in the first place, and whether it was error for the trial court to refuse to make findings on this issue.**

Even if the cruisetour contract is valid and enforceable, then for the forum selection clause to be invoked such as to support a dismissal in state court in favor of federal, the burden is on the moving party (Holland America) to prove to the trial court HOW the federal court has jurisdiction over Plaintiff's claims.

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[15] As the court in *Boutte*, 346 F.Supp. at 925 recognized:
A choice of forum agreement is unenforceable if (1) enforcement of the clause would effectively prevent the plaintiff from having his day in court; (2) the forum agreement was procured by overreaching of fraud; or (3) the Court's enforcement of the forum selection clause would violate a strong public policy.

[16] *Cf Schaff v. Sun Line Cruises, Inc.* 999 F.Supp. 924 (S.D. Tex. 1998) (Applying the forum selection clause in this case found to be fundamentally unfair because passenger's cancellation, after having paid full price but having received the ticket only three or four days before commencement, would have resulted in forfeiting the entire ticket price upon receipt of the ticket).



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> In [other cases], the [Supreme] Court applied the *Executive Jet* formulation outside the context of aviation torts and required that all maritime torts have a substantial relationship to traditional maritime activity. . . .

*Lauritzen A/S v. Dashwood Shipping Ltd*, 65 F.3d 139, 142, 1995 A.M.C. 2730 (9th Cir. 1995) (internal citations omitted)

This has come to be known as the "substantial connection" and locus tests. Both of which must be satisfied, for the court to have federal admiralty jurisdiction. *Id.* And, in this case, where the Plaintiffs are alleging the tort of fraudulent inducement, there is case law that holds that such a claim does NOT fall under federal admiralty law.[17]

Holland America clearly failed to set forth a basis for federal admiralty law with respect to Plaintiffs' claims, other than to have simply asserted, without more, that cruise ship contracts fall under maritime law. Such a bare assertion, without more, simply cannot be permitted to stand as a basis for federal admiralty jurisdiction in a case as important as this. .

**Issue 6: Whether a Plaintiff's filing in State court under the Savings to Suitors clause serves to deprive the federal court of admiralty jurisdiction and therefore comply with and satisfy the Defendant's forum selection clause.**

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[17] In *Kuehne* [*& Nagel v. Geosource, Inc.*], the plaintiffs alleged a tort of fraudulent inducement to a contract in seeking admiralty jurisdiction. The Fifth Circuit reasoned that the misrepresentation by the defendant to induce the plaintiffs into signing the contact occurred on land. The tort occurred on land. The tort occurred when the plaintiffs [were] induced to sign the contracts. The subsequent injury caused at seat to the cargo, the court concluded, was too remote to the actual tortuous conduct.

*Lauritzen, 65 F. 3d at 143* (agreeing with the *Kuehne* court) (internal citations omitted)



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***Absent a ground for Removal, the Savings to Suitors Deprives the Federal Court of Jurisdiction.***

Even were the Supreme Court to find federal admiralty jurisdiction for each of Plaintiff's claims, under the admiralty statute, 28 U.S.C. s. 1333(1) the Saving to Suitors clause provides the affirmative right to Plaintiffs to choose a state court forum to adjudicate their claims, even though they may also be admiralty and maritime in nature.

The admiralty statute provides, "[t]he district courts shall have original jurisdiction, exclusive of the courts of the state, of: (1) Any civil case of admiralty or maritime jurisdiction, **saving to suitors in all cases all other remedies to which they are otherwise entitled.**" 28 U.S.C. s. 1333(1). It is this clause that deprives the federal court of jurisdiction and permits Plaintiffs to choose a state court forum for their claims (regardless of whether they reside in state law or admiralty). If the Defendants allege that the federal court had original or exclusive subject matter jurisdiction, as they have, then the proper remedy would have been for the Defendant to remove this case to the Western District of Washington, as this would have been the only way for the King County Superior Court to definitively know whether the federal court had subject matter jurisdiction as alleged on the face of Plaintiffs' complaint. "A defendant may remove from state to federal court any civil action over which the district court would have



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had original jurisdiction. 28 U.S.C. s. 1441(a)." *Little et al. v. RMC Pacific Materials, Inc. et al*, 2005 U.S. Dist. LEXIS 14338, pg 3. However,

> [c]ourts have consistently held that the "saving to suitors" clause prohibits a defendant from removing a case that has been brought in state court absent an alternative jurisdictional basis such as diversity. . . .Moreover, **a purely maritime claim cannot be removed by a defendant alleging that application of federal maritime invokes federal question jurisdiction under § 1331.**

*Id.* at 4-5. (internal citations omitted)

Thus, simply asserting that a case involves "maritime and admiralty jurisdiction" is not enough to prove subject matter jurisdiction under the savings to suitors clause. Plus, "the burden to prove that a federal question has been pled [in the complaint] lies with the party seeking removal," *Mangual-Saez v. Brilliant Globe Logistics, Inc. et. Al, 2004 U.S. Dist. Lexis 27003* at 14, and the Defendants have so failed.

The savings to suitors clause simply provides the right to Plaintiffs to file in the state court in first instance thereby depriving the federal court of subject matter jurisdiction. *Little et. al.* at 6. *See also Auerback v. Tow Boat U.S., et al*, 303 F. Supp. 2d 538 (D.C. NJ 2004)

**Conclusion**

For these reasons, the Plaintiffs respectfully request that the Court enter an Order REVERSING the Court of Appeals order affirming the trial court's dismissal of this action, and remand this case to the trial court for further proceedings consistent with the decision of the Court.



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DATED this 27th day of November 2006.

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# APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

| | |
|---|---|
| JACK OLTMAN, BERNICE OLTMAN, and SUSAN OLTMAN,<br><br>Appellants,<br><br>v.<br><br>HOLLAND AMERICA LINE USA, INC., and HOLLAND AMERICA LINE, INC.,<br><br>Respondents. | No. 56873-6-1<br><br>UNPUBLISHED OPINION<br><br>FILED: **September 11, 2006** |

**SCHINDLER, A.C.J.** – Holland America Line's cruise ship ticket requires passengers to file lawsuits in the United States District Court for the Western District of Washington in Seattle within one year of injury. During a Holland America cruise that sailed from Valparaiso, Chile on March 31, 2004, Jack Oltman and his mother, Bernice Oltman, contracted a gastrointestinal disease. On March 30, 2005, Jack, Bernice, and Jack's spouse, Susan Oltman, (collectively "Oltman") filed a lawsuit against Holland America Line, USA Inc., and Holland America Line, Inc., (collectively "Holland America") in King County Superior Court.[1] Jack and Bernice alleged negligence, breach of contract, and fraud in the inducement. Susan alleged loss of consortium.

[1] For the sake of clarity and when necessary, we refer to Jack, Bernice, and Susan Oltman by their first names. We intend no disrespect by doing so.

On summary judgment, the trial court dismissed Oltman's lawsuit based on the forum selection clause in the Cruise and Cruisetour Contract (cruise ship contract). The court refused to strike Holland America's affirmative defenses of improper venue and the forum selection clause or the attorney's declaration in support of summary judgment. We conclude federal law governs and the forum selection clause in Holland America's cruise ship contract is valid and enforceable. We also conclude the trial court did not abuse its discretion in refusing to strike Holland America's affirmative defenses or the attorney declaration. We affirm the trial court's dismissal of Oltman's lawsuit against Holland America.

FACTS

On March 18, 2004, Bernice and Jack Oltman booked tickets through Vacations to Go Travel Agency to sail from Valparaiso, Chile, to San Diego, California, on Holland America Line's cruise ship.

Before departure Holland America issues travel documents to all passengers. The travel documents include the cruise ship ticket and the cruise ship contract. Holland America requires passengers to present the contract and the cruise ship ticket, before boarding.

Bernice and Jack received their tickets and the cruise ship contract approximately six days before boarding.[2] The cruise ship contract contains a forum selection clause. The forum selection clause is printed in all caps and is the first substantive piece of information in the cruise ship contract after the itinerary. The

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[2] During discovery, Holland America produced a Travel Document booklet identical in all respects to the one issued to Bernice and Jack, except in pagination.

cruise ship contract also informs passengers they must sue within one year of injury in the U.S. District Court of the Western District in Washington in Seattle or, if the court does not have federal jurisdiction, in state court in King County.[3]

Bernice and Jack boarded the ship in Valparaiso, Chile on March 31, 2004. During the cruise, a gastrointestinal disease outbreak occurred. Bernice and Jack alleged they contracted the disease. On March 30, 2005 Oltman sued Holland America in King County Superior Court. Bernice and Jack alleged negligence, breach of contract, and fraud in the inducement. Susan alleged loss of consortium.

Holland America filed a notice of appearance on April 8, 2005, and filed an answer on April 29, 2005. Holland America's answer asserted the forum selection clause in the cruise ship contract and improper venue as affirmative defenses. Oltman filed a motion to strike Holland America's affirmative defenses because the answer was filed 11 days after the 20-day deadline. The trial court denied the motion to strike.

Holland America filed a motion for summary judgment seeking dismissal of Oltman's lawsuit based on improper venue and the forum selection clause. In support of the motion for summary judgment, Holland America's attorney submitted a declaration with attached published and unpublished court decisions. The court denied Oltman's motion to strike the attorney's declaration and granted summary judgment for Holland America and dismissed Oltman's lawsuit.

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[3] The provisions of Holland America's Cruise and Cruisetour Contract, including the forum selection clause at issue and the one-year time provision, are also available on the company's website: www.hollandamerica.com. The website's language matches that of the Travel Document booklets issued to passengers exactly.

ANALYSIS

Motion to Strike Affirmative Defenses

Holland America filed its answer and affirmative defenses 31 instead of 20 days after service of the summons and complaint. For the first time on appeal, Oltman argues Holland America's delay in filing its answer and affirmative defenses prejudiced Oltman.

Below, Oltman asked the court to "strike Defendant's affirmative defenses as frivolous and irrelevant for failure to plead them in a timely manner, and more specifically, to strike the 'improper venue' defense as frivolous" under RCW 4.32.170.[4] On appeal, Oltman argues that if Holland America filed its answer 20 days after service, the lawsuit could have been re-filed in the U.S. District Court for the Western District of Washington at Seattle.[5] "Generally, failure to raise an issue before the trial court precludes a party from raising it on appeal." Fischer-McReynolds v. Quasim, 101 Wn. App. 801, 814, 6 P.3d 30 (2000); RAP 2.5(a). Because Oltman did not raise the issue of prejudice below, this court will not consider it on appeal.[6] Nonetheless, we

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[4] RCW 4.32.170 provides, "Sham, frivolous and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in its discretion impose."

[5] Clause A.3, on page 16 of the Travel Documents booklet, entitled "Time Limits for Noticing Claims and Filing and Service of Lawsuits," provides, "you may not maintain a lawsuit against us or the Ship for loss of life or bodily injury unless written notice of the claim is delivered to us not later than six (6) months after the day of death or injury, the lawsuit is commenced not later than one (1) year after the day of death or injury."

[6] Oltman argues prejudice is established because the one-year time limit to file suit would not have expired until late April, rather than March 31, 2005 (one year from the date of departure). Appellate courts will not consider assertions of fact not supported in the record. Voicelink Data Servs. v. Datapulse, Inc., 86 Wn. App. 613, 619, 937 P.2d 1158 (1997). But Oltman did not produce evidence supporting his argument that the case could have been re-filed in the proper court had the answer been filed within 20 days of service.

conclude the trial court did not abuse its discretion in refusing to strike the answer and affirmative defenses.

This court reviews a trial court's decision denying a motion to strike for abuse of discretion. King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King Cy., 123 Wn.2d 819, 826, 872 P.2d 516 (1994).[7] Oltman's reliance on CR 12(h)(1)(B) and Davidson v. Hensen, 135 Wn.2d 112, 954 P.2d 1327 (1998) is misplaced. CR 12(h)(1)(B) only applies when the party omits the defense from a 12(b) motion or from its responsive pleading. In Davidson, no complaint or answer was ever filed in court. The Court held homeowners waived the affirmative defense of nonregistration by waiting until after the arbitration hearing before raising the defense for the first time. Id. at 123. Oltman also cites no authority establishing affirmative defenses pleaded in an untimely answer are waived.[8] In any event, Holland America did not waive its right to assert the affirmative defenses. As provided in CR 12(h) Holland America set forth its affirmative defenses in the first responsive pleading it filed. We conclude the trial court did not abuse its discretion in denying Oltman's motion to strike the affirmative defenses.

Attorney Declaration

Holland America's attorney submitted a declaration of supplemental legal authority in support of the motion for summary judgment. In the declaration, the

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[7] Abuse of discretion occurs when the decision is "manifestly unreasonable or based on untenable grounds." Ryan v. State, 112 Wn. App. 896, 899, 51 P.3d 175 (2002) (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

[8] Where a party's "failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless." Mahoney v. Tingley, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975); see also Bernsen v. Big Bend Elec. Coop., 68 Wn. App. 427, 434, 842 P.2d 1047 (1993).

attorney listed nine cases filed in state and federal court and stated that in each case the court had enforced identical Holland America forum selection provisions. The attorney attached six federal court decisions and three King County Superior Court summary judgment orders. Two of the six federal court decisions were published decisions, four were not.

Oltman moved to strike the declaration and the authority cited on the ground that the attorney improperly cited to unpublished authority under RAP 10.4(h). Oltman also argued the declaration violated Rules of Professional Conduct (RPC) 3.7, which prohibits a lawyer from acting as an advocate and as a witness in the same trial. The court denied the motion to strike.

This court reviews trial court rulings on motions to strike for abuse of discretion. Tortes v. King County, 119 Wn. App. 1, 12, 84 P.3d 252 (2003).

RAP 10.4(h) prohibits a party from citing an unpublished opinion of the Court of Appeals as authority. The rule provides, "[a] party may not cite as an authority an unpublished opinion of the Court of Appeals." RAP 10.4(h). Because Holland America's attorney did not cite unpublished appellate court decisions as authority, the trial court did not abuse its discretion in denying Oltman's motion to strike the attorney declaration.[9]

Forum Selection Clause

Oltman contends the trial court erred in enforcing the forum selection provision in Holland America's contract and on several grounds: (1) the trial court did not engage

[9] The attorney declaration citing published and unpublished federal and state court cases also did not violate RPC 3.7.

in a choice of laws analysis and apply Washington instead of federal law; (2) the forum selection clause is invalid; (3) the federal court does not have jurisdiction because of the "saving to suitors" clause; and (4) the forum selection clause does not bar Susan's loss of consortium claim.[10]

1. Choice of Laws

Oltman contends Washington law governs the validity of Holland America's forum selection provision in the cruise ship Contract. We disagree.

Generally, federal law governs cruise ship contracts and the enforceability of a forum selection clause. Moses Taylor, 71 U.S. 411, 427 (1867); see also Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 590, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628, 79 S. Ct. 406, 3 L. Ed. 2d 550 (1959) (holding legal rights and liabilities arising from injury aboard ship are "within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law"); Wallis v. Princess Cruises Lines, Ltd., 306 F.3d 827, 834 (9th Cir. 2002) ("A cruise line passage contract is a maritime contract governed by general federal maritime law.").

Oltman relies exclusively on Nunez v. American Seafoods, 52 P.3d 720 (Alaska 2002), to argue that Washington not federal law governs. Nunez is distinguishable. In

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[10] This court reviews a grant of summary judgment de novo. Retired Pub. Employees Council of Wash. v. Charles, 148 Wn.2d 602, 612, 62 P.3d 470 (2003). Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). All facts and reasonable inferences must be taken in the light most favorable to the nonmoving party. Degel v. Majestic Mobile Manor, 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

Nunez, an employee filed suit against his employer in Alaska state court under the Jones Act and 28 U.S.C. § 1333. Id. at 721. Because the purpose of the Jones Act is to protect an employee's litigation rights, the court held that requiring the employee to file suit in federal court conflicted with the purpose of the Jones Act and was invalid. Id. at 722.

Here, unlike Nunez, Oltman is not an employee and is not covered by the Jones Act. And in Carnival Cruise Lines, the U.S. Supreme Court unequivocally held that because the passengers' injury occurred on board the cruise ship, it was a "case in admiralty, and federal law governs the enforceability of the forum-selection clause." 499 U.S. at 590. As in Carnival Cruise Lines, we conclude federal maritime law governs Oltman's personal injury claims.

2. Holland America's Forum Selection Clause

Oltman also claims the trial court erred in dismissing the lawsuit based on the forum selection provision in Holland America's cruise ship contract that designates the United States District Court of the Western District of Washington in Seattle as the proper forum for the suit.

Washington courts will enforce a forum selection clause unless doing so is unreasonable or unjust. Voicelink v. Daapulse, 86 Wn. App. 613, 618, 937 P.2d 1158 (1997). Because "the court does not accept the pleadings as true, . . . the party challenging the forum selection provision bears a heavy burdenshow it should not be enforced." Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 239, 122 P.3d 729 (2005) (citing Voicelink, 86 Wn. App. at 618). "[A]bsent some evidence submitted by the party opposing enforcement of the clause to establish fraud, undue influence, overweening

bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in court, the provision should be respected as the expressed intent of the parties." Voicelink, 86 Wn. App. at 618 (quoting Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 280 (9th Cir. 1984)).

Here, as in Wilcox, 130 Wn. App. at 238-239, the question is whether Oltman met the burden of proving the forum selection clause should not be enforced under either a de novo or an abuse of discretion standard. See also Bank of America, N.A. v. Miller, 108 Wn. App. 745, 747-48, 33 P.3d 91 (2001) (holding under either de novo or abuse of discretion standards of review, the trial court did not err in enforcing the forum selection clause).

In Carnival Cruise Lines, the Supreme Court held a non-negotiated forum selection provision in a cruise ship passenger form ticket is enforceable if the provision is reasonable and fundamentally fair, is not intended to discourage legitimate claims, and is not the product of fraud or overreaching. 499 U.S. at 593, 595. The Court identified three rationales supporting its holding: (1) cruise lines have a special interest in limiting the forum for litigation because they carry passengers from many locales, and accidents can happen in many different places along the trip; (2) forum selection clauses dispel confusion over where suits can be brought, saving litigants time and money in litigating venue; and (3) passengers benefit from reduced fares, "reflecting the savings" the cruise lines make by limiting litigation forum. Carnival Cruise Lines, 499 U.S. at 593-94.

In applying Carnival Cruise Lines' "reasonable" and "fundamentally fair" analysis, the Ninth Circuit adopted a two-pronged "reasonable communicativeness" test. Deiro v. Am. Airlines, Inc., 816 F.2d 1360, 1362 (9th Cir. 1987); see also Wallis, 306 F.3d at 835-36. The test considers (1) the physical characteristics of the ticket, including font size, conspicuousness and clarity of terms and conditions, and ease with which passengers can read the provisions; and (2) the circumstances surrounding the passenger's purchase and retention of the ticket, including familiarity with the ticket, time and incentive to study its provisions, and ability to become meaningfully informed of the ticket's terms and conditions. Deiro, 816 F.2d at 1364.

Relying on the Ninth Circuit's decision in Wallis, Oltman contends Holland America's forum selection clause fails both prongs of the reasonable communicativeness test. Oltman argues the warnings were hidden in a maze of fine print in a thirty-page contract and were not provided to Oltman in time for meaningfully review.

In Wallis, the Court addressed the validity of a liability limitation provision in the Princess Cruise Lines contract. In that case, a passenger fell overboard and died. 306 F.3d at 830. His spouse filed suit against Princess Cruise Lines in federal district court. Id. at 831-32. The liability limitation provision appeared on pages six and seven of the Princess Cruise Lines' Contract, in 1/16$^{th}$ inch font, in the sixth and seventh sentences of a paragraph entitled "LIMITATIONS ON CARRIER'S LIABILITY." Id. at 830-31. The provision directed passengers to the Athens Convention, "'Relating to the Carriage of Passengers and Their Luggage by Sea of 1976,'" or, in the alternative, to "the laws of the United States (including Title 46 U.S. Code Sections 181-186, 188)."

Id. at 831. The contract also contained a forum selection clause requiring all passengers to file suit in Los Angeles, California. Id.

After deciding federal maritime law governed, the court applied the reasonable communicativeness test. Id. at 834, 836-37. The court held the liability limitation provision met the first prong -- the physical characteristics of the ticket, but did not meet the second prong -- the ability to become meaningfully informed about the terms and conditions of the contract. The court concluded the provision did not explicitly set forth the liability limitations, but instead referenced confusing and inaccessible legal documents. Id. at 836-837. The court also concluded that the time and effort required to find the liability limitation provision was a disincentive to "study[ing] the provisions of the ticket" and impeded the passenger's ability to become meaningfully informed of the terms and conditions. Id. at 837. Because the provision failed the second prong, the court held the liability limitation provision was not valid or enforceable.[11]

Applying the Wallis analysis, we conclude Holland America's forum selection clause satisfies both prongs of the reasonable communicativeness test.[12] First, as with the liability limitation provision in Wallis, the physical characteristics of Holland America's contract are conspicuous and clear. The first page of the cruise ship Contract provides a conspicuous warning – "CONTRACT" – that notifies passengers

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[11] The court did not address the validity of the forum selection clause.

[12] Holland America produced a model contract in discovery and not Oltman's contract. The model contract differs from the one Oltman received only in pagination. The critical language and warning headings of the example contract presented in discovery matched the one issued to Oltman exactly.

of the contract's existence.[13] A bold, capitalized, and prominent heading runs along the bottom of this page: "ISSUED SUBJECT TO THE TERMS AND CONDITIONS ON THIS PAGE AND THE FOLLOWING PAGES. READ TERMS AND CONDITIONS CAREFULLY." The next page is labeled "IMPORTANT NOTICE TO PASSENGERS" and begins, "THIS DOCUMENT IS A LEGALLY BINDING CONTRACT." It directs the reader to specific clauses "WHICH CONTAIN IMPORTANT LIMITATIONS ON YOUR RIGHT TO ASSERT CLAIMS AGAINST US." Together, these warnings reasonably communicate to passengers the existence of a contract and the importance of reading its terms.

Further, as with the contract in Wallis, Holland America's contract reminds the passenger to read the terms and conditions at least five times. These reminders appear throughout the contract, including in the table of contents, where the notice "(PLEASE READ)" appears next to the word "CONTRACT," and in the "KNOW BEFORE YOU GO" booklet.[14] And, the contract repeatedly directs the passenger to the website, which provides in identical form all the contract's terms and conditions, as well as the passenger warnings and reminders.

The warnings and reminders in Holland America's contract also clearly direct the passenger to the forum selection provision. The forum selection provision is the

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[13] The record below does not indicate the size of type.

[14] On page 4 of this booklet appears a section titled "1. Check your documents." This section reminds passengers to "Please review all of your documents including the Cruise Contract, as they contain important information." And, on the face of this booklet is the invitation, "'Welcome,'" "'We invite you to visit our website at www.hollandamerica.com.'"

first substantive provision after the itinerary. It clearly states in legible, unambiguous, and conspicuous language:

> ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT, THE CRUISE, THE CRUISETOUR, THE HAL LAND TRIP OR THE HAL AIR PACKAGE SHALL BE LITIGATED, IF AT ALL, IN AND BEFORE THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, OR, AS TO THOSE LAWSUITS AS TO WHICH THE FEDERAL COURTS OF THE UNITED STATES LACK SUBJECT MATTER JURISDICTION, IN THE COURTS OF KING COUNTY, STATE OF WASHINGTON, U.S.A., TO THE EXCLUSION OF ALL OTHER COURTS.

Additionally, the contract's one-year time provision follows the conspicuous heading, "IMPORTANT TERMS AND CONDITIONS OF CONTRACT – READ CAREFULLY BEFORE ACCEPTING." Because the contract's bold, capitalized, unambiguous, and conspicuous warnings notify passengers of important terms and conditions, and because these terms and conditions are legible, unambiguous, and conspicuous, we conclude the physical characteristics of the contract satisfy the first prong of the reasonable communicativeness test.

Second, unlike the liability limitation provision in Wallis, Holland America's cruise ship contract explicitly and unambiguously states where lawsuits must be filed and meaningfully informs passengers of the terms and conditions of the contract. Also, unlike Wallis, the forum selection provision is not buried in the contract and does not direct passengers to confusing legal documents.

Relying on Casavant v. Norwegian Cruise Line, Ltd., 63 Mass. App. Ct. 785, 787-89, 829 N.E.2d 1171 (2005), cert. denied, 2006 U.S. Lexis 1184 (2006), Oltman argues he did not have the opportunity to fairly review the terms and conditions of the contract. Casavant is distinguishable. In Casavant, the passengers bought tickets

one year before departure, but Norwegian Cruise Line waited until thirteen days before departure to provide the contract's essential terms. Id. at 787-89. The court held the contract was unenforceable because the "manner and means of the delivery of the terms of the contract for passage did not fairly allow the Casavants 'the option of rejecting the contract with impunity,' and because, in the limited time frame allotted, the Casavants did not accept the ticket as a binding contract . . ." Id. at 788-89.

Here, Oltman did not book tickets for the Holland America Cruise until thirteen days before departure. Unlike in Casavant, Oltman's delay limited the time to review the travel documents and the contract before departure. In addition, there is no dispute Oltman could access the terms and conditions on Holland America's website or ask the travel agent for a model contract.

Even if the terms of the cruise ship contract meet the two-pronged Ninth Circuit test, Oltman argues in the alternative that enforcing the forum selection provision is contrary to the Supreme Court's rationale in Carnival Cruise Lines. We disagree. There is no dispute Holland America has a special interest in limiting the forum; the forum selection provision explicitly states all litigation must be brought in the United States District Court for the Western District of Washington in Seattle, unless subject matter jurisdiction is lacking;[15] and the limitation allows passengers to benefit from

[15] Since tort actions arising on cruise ships generally fall under federal maritime law, the federal court will almost always have federal subject matter jurisdiction. Kermarec, 358 U.S. at 628. This means the exception will rarely occur, and passengers will most likely never need to file in the courts of King County. Though the clause states two forums, in effect, only one forum is presented.

reduced fares. Under Carnival Cruise Lines' reasoning and analysis, Holland America's forum selection clause is fair and unreasonable.[16]

We conclude Oltman fails to meet the burden of showing under either a de novo or an abuse of discretion standard that Holland America's forum selection provision should not be enforced.

3. "Saving to Suitors" Clause

Oltman also claims the federal court does not have jurisdiction under the "saving to suitors" clause. The saving to suitors clause provides, "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1) (emphasis added).[17]

Oltman relies on Little v. RMC Pac. Materials, Inc., 2005 U.S. Dist. LEXIS 14338, at 6 (N.D. Cal. July 11, 2005), to argue the saving to suitors clause guarantees

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[16] Oltman also contends the forum selection provision is unenforceable under Washington law as unconscionable and as an adhesion contract. Because federal law governs this case, we need not address Oltman's argument. Nonetheless, the provision is not unconscionable and is enforceable under Washington law. In Adler v. Manor, 153 Wn.2d 331, 104 P.3d 773 (2004), the Court noted the Ninth Circuit has criticized one-year limitation provisions and concluded an employer's 180-day statute of limitations on arbitration agreements was substantively unconscionable. The Court did not rule one-year provisions unconscionable and did not extend its holding beyond the context of labor arbitration agreements. 153 Wn.2d at 356. And, "the fact that an agreement is an adhesion contract does not necessarily render it procedurally unconscionable." Zuver v. Airtouch Communs. Inc., 153 Wn.2d 293, 304, 103 P.3d 753 (2004); see also Wilcox, 130 Wn. App. at 242.

[17] "Under the statute, a plaintiff may file an in personam maritime claim in the state court where Congress has authorized such suits, or where such suits were known at common law and Congress has not conferred exclusive jurisdiction on federal courts." Hoddevik v. Arctic Alaska Fisheries Corp., 94 Wn. App. 268, 970 P.2d 828 (1999). Federal and state courts enjoy concurrent jurisdiction over in personam cases. Willapa Trading Co., v. Muscanto, Inc., 45 Wn. App. 779, 783, 727 P.2d 687 (1986). State courts presiding over in personam admiralty cases under this statute must follow "substantive maritime law." Hoddevik, 94 Wn. App. at 273.

cruise ship passengers the right to file suit in state court. Little does not support Oltman's argument and is inapposite. While the Little court stated that the saving to suitors clause allows plaintiffs to file suit in state court, the court did not address a valid forum selection clause in a cruise ship contract. Id. at 6. The issue in Little concerned removal of a state action based on maritime jurisdiction. Id. at 4. The Little court explained that if the defendant seeks to remove a case in admiralty that was originally filed in state court under the saving to suitors clause, the defendant must establish an alternative basis for federal jurisdiction. Id. at 4-6.

4. Loss of Consortium

Oltman cites no authority that Susan's loss of consortium claim is not subject to the forum selection clause governing the litigation rights of the injured spouse.[18] We need not address arguments not supported by citation to authority. RAP 10.3(a)(5); see also State v. Giffing, 45 Wn. App. 369, 376, 725 P.2d 445 (1986) ("Contentions without support of authority need not be considered on appeal."). Nonetheless, the trial court did not err in dismissing Susan's consortium claim. Loss of consortium is a separate, not a derivative claim. Greene et al v. A.P.C., 136 Wn.2d at 101. But, "an element of this cause of action is the 'tort committed against the 'impaired' spouse.'" Conradt v. Four Star Promotions, Inc., 45 Wn. App. 847, 853, 728 P.2d 617 (1986) (quoting Lund v. Caple, 100 Wn.2d 739, 747, 675 P.2d 226 (1984)). The cruise ship contract provides that it applies to "ALL DISPUTES AND MATTERS WHATSOEVER

[18] In the reply brief, Oltman cites Greene et al v. A.P.C., 136 Wn.2d 87, 101, 960 P.2d 912 (1998), as authority that loss of consortium is a separate, not a derivative claim. But the issue here is whether a forum selection clause applies to a non-injured spouse who was not a party to the contract limiting litigation rights.

ARISING UNDER, IN CONNECTION WITH OR INCIDENT TO THIS CONTRACT, THE CRUISE...." Susan Oltman's claim is not separate from the alleged injury her husband suffered while on the cruise. Her claim both arises under and in connection with the cruise. Therefore, the contract, including the valid forum selection clause, applies to her.

We affirm the trial court's decision granting Holland America's motion for summary judgment and dismissing Oltman's lawsuit.

Schindler, ACJ

WE CONCUR:

Appelwick, CJ.

Baker, J.

# APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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|---|---|---|
| JACK OLTMAN, BERNICE OLTMAN, and SUSAN OLTMAN,<br><br>Appellants,<br><br>v.<br><br>HOLLAND AMERICA LINE USA, INC., and HOLLAND AMERICA LINE, INC.,<br><br>Respondents. | ) | No. 56873-6-1<br><br>ORDER DENYING APPELLANTS' MOTION TO RECONSIDER |

Appellants filed a motion for reconsideration of the opinion filed September 11, 2006. A majority of the panel has determined this motion should be denied. Now, therefore, it is hereby

ORDERED that appellants' motion for reconsideration is denied.

DATED this 24th day of October 2006.



FOR THE PANEL:

Presiding Judge

# APPENDIX C

**Washington State Constitution Article I, Section 21**

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

**28 U.S.C. s. 1333(1).**

The admiralty statute provides, "[t]he district courts shall have original jurisdiction, exclusive of the courts of the state, of: (1) Any civil case of admiralty or maritime jurisdiction, **saving to suitors in all cases all other remedies to which they are otherwise entitled.**"

**Civil Rule 12(a)**

A defendants **shall** serve his answer within the following periods: (1) Within 20 days, exclusive of the day of service, after the service of the summons and complaint upon him pursuant to rule 4.

**Civil Rule 12(h)(1)**

A defense of lack of jurisdiction over the person, **improper venue**, insufficiency of process, or insufficiency of service of process **is waived** . . . (B) if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

## Forum Selection Clause

ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH...THIS CONTRACT, THE CRUISE...SHALL BE LITIGATED IF AT ALL, IN AND BEFORE THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, **OR AS TO THOSE LAWSUITS AS TO WHICH THE FEDERAL COURTS OF THE UNITED STATES LACK SUBJECT MATTER JURISDICTION, IN THE COURTS OF KING COUNTY, STATE OF WASHINGTON, U.S.A., TO THE EXCLUSION OF ALL OTHER COURTS.** (CP 109)

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

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|---|---|---|
| JACK OLTMAN, BERNICE OLTMAN, and SUSAN OLTMAN, | ) | No. 56873-6-1 |
| Appellants, | ) | ORDER GRANTING MOTION TO PUBLISH |
| v. | ) | |
| HOLLAND AMERICA LINE USA, INC., and HOLLAND AMERICA LINE, INC., | ) | |
| Respondents. | ) | |

Respondents, Holland America Lines USA, Inc., filed a motion to publish the opinion filed on September 11, 2006 and a majority of the panel has determined that the motion should be granted; Now, therefore, it is hereby

ORDERED that respondents' motion to publish the opinion is granted.

DATED this 3rd day of October, 2006.

FOR THE PANEL:

Presiding Judge